Petition

81-1624

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

THOMAS A. MCCRARY,
JESSE CLEVELAND,
JAMES YARBROUGH, AND
THE INDEPENDENT PARTY OF GEORGIA,

Petitioners

vs.

DAVID B. POYTHRESS, Secretary
of State of Georgia and
Chairman State Election Board,
AND KIP MC VAY, Executive
Director Georgia Campaign and
Financial Disclosure Commission,
AND FRANCES DUNCAN, Member Georgia
Election Board,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

JESSE CLEVELAND
215 Copeland Road N.E.
Atlanta, Georgia 30342
404-256-0888

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QUESTIONS PRESENTED

1. Whether the amendment of the Georgia Election Code requirement of 5% of the signatures of all Georgia registered voters for state-wide elections, to only 2½% of all registered Georgia voters; while local elction contests retained the original 5% voter signature requirement, unconstitutionally discriminates against independent and third party political candidates as regards the opinion of this Court in Chicago Board of Elections v. Socialist Workers Party, 59 L.Ed. 2nd 230 (1979).

2. Whether the above described amendment of Georgia rendered moot the opinion of this Court in Jenness v. Fortson, 403 U.S. 431 (1971).

3. Whether Georgia Code § 34-1002(d) which requires third party political candidates to submit their voter signature petitions by the second Wednesday in July of each election year, is unconstitutionally arbitrary and discriminary in view of Mandel v. Bradley, 432 U.S. 173 (1978).

4. Whether Georgia Code 34-1103(c) is unconstitutional because said code section provides that the candidate of the political party receiving the highest number of votes in the last election for Governor of Georgia shall always be on the left side of the Georgia General Election Ballot and the political third party candidate shall always be on the right side of said ballot.

5. Whether the opinion of this Court in American Party of Texas v. White, 415 U.S.

767 (1974) that 1% of the voters signatures in the last election or 22,000 signatures was the maximum requirement that a State could require a third political party to amass for ballot status , superseded the earlier opinion of this Court in Jenness v. Fortson, 403 U.S. 431 (1971).

6. Whether Georgia Code § 34-1908, which makes the false signing of a third party political candidate signature petition a felony, and Georgia Code § 34-1011 (b) which permits the Georgia Secretary of State to subpoena anyone who signs such a petition, unconstitutionally deters registered voters of Georgia from signing said candidate petitions.

7. Whether Georgia Code § 1011 (a) is so vague and indeterminate that it permits the Georgia Secretary of State to void thousands of voter signatures on political candidate signature petitions for dubious reasons.

8. Whether Georgia Code § 34-1012 requires a third political party to set up elaborate de facto primary machinery in contravention of the Supreme Court ruling in Williams v. Rhodes 393 U.S. 23 (1968).

9. Whether Georgia Code § 34-1206 (g) which requires a voter wishing to cast a write-in vote in a Georgia General Election to obtain a paper ballot from an election supervisor, actually provides an effective alternative to a place on the election ballot.

10. Whether the Georgia Campaign and Financial Disclosure Act (Georgia Code § 40-3801 inclusive) requires third party political candidates to file election campaign financial disclosure reports 45 days before the political party primaries; 15 days before the primaries, and 10 days after the primaries; or only one report 15 days before the Georgia General Election and another report before December 31 of the same election year.

11. Whether petitioner Thomas A. McCrary's constitutional and civil rights were violated when respondent Frances Duncan used a false assertion that McCrary had not filed a required campaign financial disclosure report 45 days before the political party primaries to induce McCrary to withdraw his filing fee for election to the office of Governor of Georgia by a mistake of fact.

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PETITION FOR A WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF
APPEALS OF THE UNITED STATES

To the Honorable, the Chief Justice
and Associate Justices of the
Supreme Court of the United States:
Thomas A. McCrary, et al, petitioners
herein, pray that a writ of certiorari
issue to review the judgment of the
Fifth Circuit Court of Appeals of the

United States entered in the above entitled case on March 12, 1981, with a denial for reconsideration entered on April 13, 1981.

Opinions Below

The opinion of the Fifth Circuit Court of Appeals of the United States is reported and is printed in Appendix A hereto, infa, page A-1. The judgment of the United States District Court for the Northern District of Georgia is printed in Appendix A hereto, infa, page A-34.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals of the United States was entered on March 12, 1981, with a denial of reconsideration entered on April 13, 1981. The jurisdiction of the Supreme Court is invoked under 28 USCA § 1257.

STATUTES INVOLVED

1. Georgia Code § 34-1010(b) as amended provides that the nomination petition of a political candidate shall be signed by a number of Georgia electors of not less than 2½% of the total number of voters eligible to vote in the last election, for qualification to a statewide political race; but 5% of all registered voters for a local election race.

2. Georgia Code §§ 34-1002(d) provides:

> "Each candidate required to file a notice of candidacy by this Section shall, no later than 12:00 noon on the second Wednesday in July immediately prior to the election, file with the same official with whom he filed his notice of candidacy, a nomination petition in the form prescribed....."

3. Georgia Code § 34-1103(c) regarding placement of candidate names on the Georgia General Election Ballot provides:

" Immediately under the directions, the names of all candidates, who have been nominated in accordance with the requirements of the Code, shall be printed on the ballot and the names of the candidates shall in all cases be arranged under the titles of the respective offices they are seeking. The names of candidates who are nominees of a political party shall be placed under the name of the party. The columns of political parties shall be printed on the ballot, beginning on the left side thereof, and shall

be arranged from left to right in the descending order of the totals of votes cast for candidates of the political parties for Governor at the last gubernatorial election. The columns of parties having no candidate for Governor on the ballot at the last gubernatorial election, shall be arranged alphabetically, according to the party name, to the right of the party columns they represent. The columns of political bodies shall be arranged alphabetically according to the body name, to the right of the of the party columns....."

4. Georgia Code § 34-1908 makes it a felony to falsely sign a third party political candidate signature petition.

5. Georgia Code § 34-1011(b) permits the Georgia Secretary of State to subpoena anyone who signs such a petition.

6. Georgia Code § 34-1011(a) regarding the counting of voter signatures provides:

"When any nomination petition is presented in the office of the Secretary of State or of any Superintendent for filing within the period limited by this Code, it shall be the duty of such officer to examine the same to the extent necessary to determine if it complies with the law. No nomination petition shall be permitted to be filed if: (i) it contains material errors or defects apparent on the face thereof; (ii) it contains material alterations made after signing without the consent of the signers; or (iii) it does not contain a sufficient number of signatures as required by law.

The Secretary of State or any Superintendent may question the genuineness of any signatures appearing on a petition or the qualification of any signer whose signature appears thereon, and if he shall thereupon find that any such signature is improper, such signatures shall be disregarded in determining whether the petition contains a sufficient number of signatures as required by law...."

7. Georgia Code § 34-1012(c) respecting required third political party conventions, states:

"The Secretary of State shall not approve any such rules or regulations unless they provide:

(1) That a notice of the proposed date for the holding of any such convention must be published in a newspaper having a general circulation within the area to be affected at least 10 days

prior to the date of any such convention. Such notice shall also state the purpose for which the convention has been called; and

(2) That delegates to the convention shall be certified pursuant to appropriate party or body rules by the proper party or body officials; and

(3) That delegates to the convention shall be apportioned in such a manner as will properly reflect the number of electors residing within the political subdivisions or area affected in accordance with the last United States decennial census; or apportioned according to the number of votes received by the party's candidate for the office of President of the United States in the last

presidential election in the areas concerned; or appropriated according to the number of votes received by the party's candidate for the office of Governor of Georgia in the last gubernatorial election in the areas concerned; and

(4) In the event that more than one county is involved, each county shall have at least one delegate to the convention, and such additional delegates as shall be alloted thereto , shall be apportioned according to the provisions of (3) above....."

8. Georgia Code § 34-1206(g) requires a voter wishing to cast a write-in vote in a Georgia General Election to obtain a paper ballot from an election supervisor.

9. Georgia Code § 40-3806 of the Georgia Campaign Financial Disclosure Act states:

> "Such campaign financing disclosure reports shall be filed 45 days and 15 days before the primary election, and 10 days after the primary election. Candidates in a general or special election campaign shall make such reports 15 days prior to the general or special election and all candidates shall make a final campaign disclosure report not later than December 31 of the year in which the election occurs."

STATEMENT OF THE CASE

The petitioners are Thomas A. McCrary, a member of the Independent Party of Georgia, who was nominated by that body to qualify as its candidate for the office of Governor of Georgia

in the November 7, 1978, general election; Jesse Cleveland, a member of the Independent Party of Georgia, who was nominated by that body to qualify as its candidate for the office of State Representative, District 46; James Yarbrough, an elector of the State of Georgia; and the Independent Party of Georgia, a political body under the laws of the State of Georgia.

The petitioners sought injunctive relief from the district court directed against the respondent Georgia state officials to preclude the respondents from keeping the names of the petitioners McCrary and Cleveland off the November 7, 1978, general election ballot. Also sought was relief against certain provisions of the Georgia Campaign and Financial Disclosure Act affecting third party political candidates.

Both the district court and the Fifth Circuit Court refused to grant relief to the petitioners, citing Jenness v. Fortson ,403 U.S. 413 (1971) as authority for the proposition that nothing could possibly be rotten in Georgia election campaigns!

REASONS FOR GRANTING WRIT

The Rule 21 decision by the Fifth Circuit Court failed to take account of this Court's unamimous decision in Chicago Board of Elections v. Socialist Workers Party, 59 L. Ed. 2d 230 (1979), although the petitioners notified the Fifth Circuit Court of that important precedent.

In that decision, the case of Lendall v. Jernigan, 424 F. Supp. 951 (D.C. Ark. 1977), was cited with approval, and this passage quoted therefrom;

"Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplihing the state's goals and must be found to unduly impinge on the constitutional rights of independent candidates, new political parties and political organizations."

Since the present legal requirements for voter signatures on a candidate nomination petition in Georgia will approach the 60,000 number expressly condemned by the Court in Chicago Board of Elections, supra, for the 1982 Georgia General Election, and will exceed that number with each succeeding year because of the growth of Georgia's registered voters (Georgia Code §§ 34-1010b); it is imperative that this Court measure this

Georgia requirement by the yardstick set forth in Chicago Board of Elections, supra.

After the filing of this cause of action in federal court, the Georgia General Assembly amended the Georgia Election Code to provide that candidate nomination signatures for statewide elective offices must equal 2½% of the number of registered voters in Georgia; but such signatures for county or municipal offices shall equal 5% of the registered voters in those districts.

In the metropolitan Atlanta area this latter provision flies directly in the face of Chicago Board of Elections, supra, because Atlanta's population and number of registered voters increase each year. It is not inconceivable that the demand for 5% of the voter signatures in Atlanta would soon ap-

prach that of the 2½% for Georgia statewide offices.

A similar occurrence in Chicago caused this Court to strike down such a provision as being unconstitutional.

Further the Fifth Circuit Court misapplied the Supreme Court decision in Jenness v. Fortson, 403 U.S. 431(1971).

The United States District Court in Atlanta through Ashworth v. Fortson, 424 F.Supp. 1178 (1976) ruled that Jenness, supra, was not controlling in the matter of filing deadlines for political body candidates in Georgia.

In fact the unapplicability of Jenness, supra, was directly stated in the separate opinion of Justice John Paul Stevens in Mandel v. Bradley, 432 U.S. 173, at 181, (1978);

"Thus the procedures for filing by independents under the Georgia statute are similar to those aspects of the Maryland procedures in issue here which I find such a handicap on independent candidates. However, the question I find decisive in this case neither was raised nor decided by the Court in Jenness, sec. id at 434, 29 L.Ed. 2d 554, 91 S.Ct. 1970, thus that decision is not controlling on this point."

Mandel v. Bradley, ibid, clearly states that when the beginning point for the time period to gather voter signatures is too far removed from the election date, and is adversely affected by bad weather, it is unconstitutional.

Georgia's said period begins in January of each election year. It is not until April

that the Georgia weather permits the kind of open air canvassing of voters that might result in some progress with such signature collection.

Not to be deterred, the 1981 Georgia General Assembly has now passed an amendment to the Georgia Election Code requiring independent candidates to begin their voter signature petitions in December before each election year, and submit them one month before political body candidates must file their voter signatures.

Finally, the panel took no notice of the United States District Court in Atlanta in John B. Anderson v. David Poythress, Sec. of State of Georgia, C80-1671A (Oct., 1980), which found that the Georgia Secretary of State had discriminated against the candidacy

of Independent Presidential Candidate, John Anderson by many and myriad means, even though his supporters turned in the signatures of more than 60,000 Georgia voters. The respondent Georgia Secretary had refused to place Anderson's name on the 1980 Georgia General Election Ballot.

Another aspect of sharp practice by the respondent state officials concerns the "interpretation" of the Georgia Campaign and Financial Disclosure Act (Georgia Code §§ 40-38).

The Courts below contend that the unconstitutional application of this Act and its misuse by the respondents was rendered moot when the respondents sent petitioner Cleveland a letter admitting that respondents had made a "mistake" in threatening Cleveland with legal

prosecution if Cleveland did not file a campaign financial disclosure report at the date demanded by the respondents.

This assumption fails to address the fact that petitioner, McCrary, was libeled by the Atlanta Constitution News Paper in June, 1978, as a result of a false report given to a reporter for that newspaper by respondent, Frances Duncan, maliciously stating that McCrary had not filed the first campaign financial disclosure report required under the Act.

In addition said assumption failed to notice that petitioner McCrary, was forced under threat of legal prosecution to set up elaborate campaign reporting committees before said organization was required by said Act.

The fact that the Supreme Court of Georgia has twice found that "interpretations" of this Act by the respondents to be unlawful, underscores the discriminatory application of its "enforcement".

Conclusion

To state that the Jenness v. Fortson decision, supra, was devastating to third party and independent candidates in Georgia, would be a grave understatement.

The respondent Georgia officials took Jenness, to mean that they could control Georgia's election process with impunity, and keep third party and major independent candidates off the Georgia General Election Ballot.

The Georgia election ballot requirements

will only increase each year and further prevent any third party or independent candidate from reaching Georgia ballot status.

If this Court does not take action to remedy this sad situation, the State of Georgia will surely continue to be ruled by the same vicious and corrupt political machine that has ravished Georgia continuously for the last one hundred years.

Certificate of Service

I certify that I served a copy of this brief for application on the attorney for the respondents by hand delivery at his law office, to wit;

Michael Bowers
Senior Assistent State Attorney-General

State Judicial Building
244 Washington Street S.W.
Atlanta, Georgia 30303

This 10th day of July, 1981.

Jesse Cleveland
Attorney for Petitioners

APPENDIX

APPENDIX A

Opinion of the Courts Below

United States Court of Appeals, Fifth Circuit

March 12, 1981

THOMAS A MC CRARY et al
Plaintiffs-Appellants

v.

DAVID B. POYTHRESS, Secretary of the State of Georgia and Chairman State Election Board et al., Defendants-Appellees

Appeal from the United States District Court for the Northern District of Georgia.

Before GOLDBERG, CHARLES CLARK and THOMAS A. CLARK, Circuit Judges

THOMAS A CLARK, Circuit Judge:

The appeal asserts that the district court erred in dismissing the complaint of the plaintiffs below, who challenged many

provisions of the Georgia Election Code Ga. Code Ann. § 34-101 et seq. The Independent Party of Georgia, a political body under the Georgia Election Code, and Thomas McCrary, Jesse Cleveland, and James Yarbrough, nominees of the Party for various Georgia elective offices were the plaintiffs below. The defendants were the Georgia Secretary of State (who, by virtue of his office, is also Chairman of the State Elections Board), the Director of the Elections Division, and the Executive Director of the Georgia Campaign and Financial Disclosure Commission, all in their respective capacities. In their brief plaintiffs list twenty one issues, some of which are duplicious , some of which were not presented to the trial court below, and some of which are not specifically argued in the appellate brief.

We shall attempt to ferret out the issues raised by appellant, consolidate them, and treat them in a manner which will answer each of appellant's numbered issues and at the same time try to give some coherence to the opinion.

[1] Appellant's first four numbered issues complain about the defendants' application of the Georgia Campaign and Financial Disclosure Act (Ga. Code Ann. § 40-3601 et seq.) to plaintiffs. Appellants complain that the Georgia Secretary of State and the Director of the Georgia Campaign and Financial Disclosure Commission wrongly required certain campaign financial disclosure reports of plaintiff McCrary. Additionally, those defendants were charged with issueing a press release announcing that McCrary

had failed to file the necessary disclosure reports. Subsequently, the defendants learned that such a disclosure was not required by Georgia law and they wrote McCrary that they had made a mistake and that such a report would not be required of him. The trial court dismissed this claim on the ground of mootness in that the defendants had conceded error and abandoned the request for the reports[1].* That the issue is now moot is illustrated by the treatment of a similar dispute in Illinois State Board of Elections v. Socialist Workers Party 440 U.S. 173, 99 S.Ct. 983, 992, 59 L.Ed. 2d 230 (1979): Appellant "has presented no evidence creating a reasonable expectation that the [Commission] will repeat its purported unauthorized actions in subsequent elections. Appellant's conclusory assertions that the actions are capable of repetition are not sufficient."

The court did not specifically address McCrary's claim of libel as a result of the incorrect report to the newspaper nor his claim that his constitutional rights were violated by defendants' false assertion that he had not complied with the disclosure statute.[2] *Appellants argue in their brief at 10-13 that a live issue persists, but, as we have noted, supra note 1, their claims amount to no more than "conclusory assertions" that such misunderstandings are capable of repetition. This we deem insufficient for the granting of any prospective relief. Appellants have not argued in their brief, however, that the lower court erred in failing to find any deprivation of state or federal constitutional rights as a result of the prior experience. We therefore deem any

claim of error to that effect to have been waived. F.R.A.P. 28(a)(4). See e.g. Harris v. Plastics Manufacturing Co., 617 F.2d 438, 440 (5th Cir. 1980); Tedder v. F.M.C. Corp., 590 F.2d 115, 117(5th Cir. 1979).

[2] Appellants level a broadside attack on Georgia's Election Code that, in short, alleges unconstitutional restrictions upon plaintiff's access to the general election ballot.[3] *In summary, these claims allege that differing provisions governing the filing of notices of candidacy by party primary candidates and those qualifying by petition deny the latter equal protection (34-1002c); that the number of nominating signatures required of petition-qualifying candidates is too high (§§ 34-1010b); that the petition filing deadline is too early (§§ 34-1002d); that provisions designed to

protect political bodies from unauthorized candidates are arbitrary (34-1010g); that state election officials' authority to inspect nominating petitions is unconstitutionally vague (34-1011a); that Georgia burdens political bodies with an unduly elaborate nominating procedure (34-1012); and that write-in procedures in elections using voting machines are inadequate (34-1206g).

For example, their issue #18 charges that Ga. Code Ann. §§ 34-1012 requires appellants to set up elaborate de facto primary machinery in contravention of the Supreme Court's holding in Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed. 2d 24(1968). Appellants' attack flies in the face of approval of Georgia's statutory election

machinery by the Supreme Court in Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed. 2d 554(1971). Since the opinion of the Supreme Court in that case answers many of the issues raised by the appellant, we will extensively quote from it. We add that appellants point us to no decision of our highest court which limits that broad approval of Georgia's election procedures.

> "The basic structure of the pertinent provisions of the Georgia Election Code is relatively uncomplicated. Any political organization whose candidate received 20% or more of the vote at the most recent gubernatorial or presidential election is a "political party". Any other political organization is a "political body". "Political parties" conduct primary elections,

regulated in detail by state law, and only the name of the candidate for each office who wins this primary election is printed on the ballot at the subsequent general election, as his party's nominee for the office in question. A nominee of a "political body" or an independent candidate, on the other hand, may have his name printed on the ballot at the general election by filing a nominating petition. This petition must be signed by a "number of electors of not less than five per cent of the total number of electors elgible to vote in the last election for the filing of the office the candidate is seeking..." The total time allowed for circulating a nominating petition is

180 days, and it must be filed on the second Wednesday in June, the same deadline that a candidate filing in a party primary must meet.

It is to be noted that these procedures relate only to the right to have the name of a candidate or the nominee of a "political body" printed on the ballot. There is no limitation whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted.

In this litigation the appellants have mounted their attack upon Georgia's nominating petition requirement on two different but unrelated constitutional fronts. First, they say that to require a non-party candidate to secure the signatures

of a certain number of voters before his name may be printed on the ballot is to abridge the freedoms of speech and association guaranteed to that candidate and his supporters by the First and Fourteenth Amendments. Secondly, they say that when Georgia requires a nonparty candidate to secure the signatures of 5% of the voters before printing his name on the ballot yet prints the names of those candidates who have won nomination in party primaries it violates the nonparty's candidate the equal protection of the laws. Since both arguments are primarily based upon this Court's decision in Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed. 2d 24, it becomes necessary

to examine that case in some detail.

The Williams case, it is clear, presented a statutory scheme vastly different from the one before us here. Unlike Ohio, Georgia freely provides for write-in votes. Unlike Ohio, Georgia does not require every candidate to be the nominee of a political party, but fully recognizes independent candidates. Unlike Ohio, Georgia does not fix an unreasonably early filing deadline for candidates not endorsed by established parties. Unlike Ohio, Georgia does not impose upon a small party or a new party the Procrustean requirement of establishing elaborate primary election machinery. Finally, and in sum, Georgia's election laws, unlike Ohio's do not operate to

freeze the political status quo. In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution.

Anyone who wishes, and who is otherwise eligible may be an independent candidate for any office in Georgia. Any political organization, however new or however small, is free to endorse any otherwise eligible person as its candidate for whatever elective public office it chooses. So far as the Georgia election laws are concerned independent candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. They may confine themselves to an appeal for write-in votes. Or they may seek, over a six month's period, the signatures of 5% of the eligible voters for the office in question. If they choose

the latter course, the way is open. For Georgia imposes no suffocating restrictions whatever upon, the free circulation of nominating petitions. A voter may sign a petition even though he has signed the petition of others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand is a person who was not even registered at the time of the previous

election. No signature on a nominating petition need be notarized.

The open quality of the Georgia system is far from merely theoretical. For the stipulation of facts in this record informs us that a candidate for Governor in 1966 and a candidate for President in 1968, gained ballot designation by nominating petitions, and each went on to win a plurality of the votes cast at the general election.

In a word, Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life. Thus any political body that wins as much as 20% support at an election becomes a "political party" with its attendant ballot position rights and primary election obligations, and any "political party" whose support

at the polls falls below that figure reverts to the status of a "political body" with its attendant nominating petition responsibilities and freedom from primary election duties. We can find in this system nothing that abridges the rights of free speech and association secured by the First and Fourteenth Amendments.

The appellants' claim under the equal protection clause of the Fourteenth Amendment fares no better. This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary. This is a premise that cannot be uncritically accepted. Although

the number of candidates in a party primary election for any particular office will, of course, vary from election to election, the appellee's brief advises us that in the most recent election year there were 12 candidates for the nomination for the office of Governor in the two party primaries. Only two of these 12, of course, won their party primaries and had their names printed on the ballot in the general election. Surely an argument could as well be made on behalf of the 10 who lost, that it is they who were denied equal protection vis-a-vis a candidate who could have had his name printed on the ballot simply by filing a nominating petition signed by 5% of the total electorate.

The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternate paths, neither of which can be assumed to be inherently more burdensome than the other.

Insofar as we deal here with the claims of a "political body", as con-

trasted with those of an individual aspirant for public office or an individual voter, the situation is somewhat different. For it is true that a "political party" in Georgia is assured of having the name of its nominee-the primary election winner-printed on the ballot, whereas the name of the nominee of a "political body" wil be printed only if nominating petitions have been filed that contain the requisite number of signatures. But we can hardly suppose that a small or a new political organization could seriously urge that its interests would be advanced if it were forced by the State to establish all of the elaborate statewide

> county-by county, organizational paraphernalia required of a "political party" as a condition for conducting a primary election. Indeed, a large reason for the Court's invalidation of the Ohio election laws in Williams v. Rhodes, supra, was precisely that Ohio did impose just such requirements on small and new political organizations."

403 U.S. at 433-34, 438-41, 91 S.Ct. at 1971-72, 1974-76 (footnotes omitted, emphasis in original).

It is clear from reading Jenness that the Supreme Court looked at the totality of the Georgia statutory election machinery in approving certain criticized sections of the statute, as it did in Williams v. Rhodes, in

which the court disapproved of the Ohio election system because of its collective deficiencies. We emphasize appellants' charge that Georgia's five percent signature requirement is unconstitutional and the statement in their brief that the Supreme Court in American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed. 2d 744 (1974), held "that one percent of the voters' signatures in the last election or 22,000 signatures was the maximum requirement." This is a gross distortion of the holding in that opinion. In referring to the one-percent requirement the Court clearly indicated that more than that provision was involved: "The District Court balanced this lenient one percent petition requirement against what it thought was a somewhat burdensome requirement of precinct,

county, and state conventions" 415 U.S. at 782, 94 S.Ct. at 1307, n.15. Justice Douglas dissented in White and favorably compared the Georgia election laws as approved in Jenness to the Texas election scheme of which he disapproved. In concluding that the totality of requirements imposed upon minority parties was unconstitutional, he went on as follows:

> An analysis of the requirements imposed on independent candidates leads me to the same conclusion. Under the procedures reviewed in Jenness, independent candidates seeking a ballot position had six months to secure the signatures of 5% of the eligible electorate for the office in question. The percentage required in Texas ranges according to the office, from 1% of the last statewide gubernatorial vote to5%

of the last local gubernatorial vote, and in any case no more than 500 signatures are required; the candidate, however, has only 30 days in which to gather them. In Jenness a voter could sign a candidate's petition even though he had already signed or would sign the application of more than one candidate. In Jenness a voter who signed the petition of an independent was free thereafter to participate in a party primary and a voter who previously voted in a party primary was fully eligible to sign a petition. Here independents are not even allowed to seek signatures until after the major party primaries and no voter who has participated in a party primary is allowed to sign an independent candidate's

application. In Jenness no signature on a nominating petition had to be notarized, but that is not the case here.

In Jenness we were able to say that Georgia 'has insulated not a single potential voter from the appeal of new political voices within its borders.' 403 U.S. at 442, 91 S.Ct. at 1976. In Texas, however, the independent, like the minority party, must 'draw [his] support from the ranks of those who [are] either unwilling or unable to vote in the primaries of the established parties'. American Party of Texas v. Bullock, 409 U.S. [803], at 806, 93 S.Ct. [25], at 27 [34 L.Ed. 2d 63]. As with minority parties, I do not believe that Texas may constitu-

tionally leave independent candidates 'to be content with the left-overs to get on the ballot.'"

415 U.S. at 797-99, 94 S.Ct. at 1314-15. Appellants are simply wrong in stating in their brief that the Court in White established 1% as the maximum percentage of voter signatures that the state may require for qualification purposes.[4] *Since the filing of the complaint the 5% requirement in Georgia has been lowered to 2½% to qualify for statewide office, but remains at 5% for offices not voted upon statewide. Ga. Code Ann. § 34-1010(b), amended 1979.

Appellants also complain that the petition filing deadline is too early. This was expressly answered by Jenness: "Unlike Ohio, Georgia does not fix an unreasonable

early filing deadline for candidates not endorsed by established parties." 403 U.S. at 483, 91 S.Ct. at 1974. Since that opinion the deadline has been moved from the second Wednesday in June to the second Wednesday in July. See Ga. Code Ann. § 34-1002, amended 1979.[5]

*We are not confronted with the burdens faced by independent or third party Presidential candidates who encounter widely varying restrictions on access to state ballots in the course of the extended Presidential campaign season. Several factors peculiar to our only nationwide election would then have to be considered in balancing the state's interest in reasonable ballot control against the can-

didates's right of access, most important among these the unusual length of the Presidential campaign, coupled with the lack of any nationwide primary process in which party candidates can be evaluated on other than a state-by-state basis. In such a setting a particular state's insistence on an early petition filing deadline, by which time an independent or minority party national candidate must qualify his or her electors, takes on a different character. Anderson v. Hooper, 498 F.Supp. 898 (D.N.M 1980)(order granting preliminary injunction); Anderson v. Celebrezze, 499 F.Supp. 121 (S.D. Ohio 1980)(order granting permanent injunction) U.S. cert. denied, __ U.S.__, 101 S.Ct. 41, 65 L.Ed.2d 1181(1980); Anderson v. Morris, 500 F.Supp. 1095 (D.Md. 1980);

and Anderson v. Quinn, 495 F.Supp. 730 (D.Me. 1980), all enjoining enforcement of early March or April state filing deadlines in the case of a Republican Presidential candidate who announced his independent candidacy on April 24.

Finally appellants complain that Ga. Code Ann. § 34-1103(c) is unconstitutional because the political party receiveing the highest number of votes in the last gubernatorial election shall be listed in the first column on the left side of the ballot. The district court order dismissing the complaint is dated September 14, 1978, and judgment was entered against plaintiffs the same day. This order neither mentions nor rules on any issue pertaining to Ga. Code Ann. § 34-1103(c) or ballot placement. Our

review of the original complaint, filed July 10, 1978, reveals that it does not make reference to Ga. Code Ann. §§ 34-1103(c). On September 6, 1978, plaintiff filed an "Amendment of Complaint" in which this Code section and ballot placement issue is pled. The defendants filed a renewed motion to dismiss and supporting brief on September 15, and plaintiffs filed their reply brief on September 19, 1978. Plaintiffs filed their Notice of Appeal from the order of September 14 on September 22, 1978.

[3] Appellants now claim that the lower court erred in not deciding this issue in their favor.[6] *We will not reach the merits of this claim, without any consideration by the lower court. This court

habitually declines to reach questions not passed on below unless (1)the question is purely one of law and (2) failure to reach it would result in a miscarriage of justice. See e.g. Guerra v. Manchester Terminal Corp, 498 F.2d 641, 658 n.47(5th Cir. 1974) reh. denied, 503 F.2d 567; Evans v. Triple R Welding & Oil Field Maintenance Corp., 472 F.2d 713, 716, (Fifth Cir. 1973); and McCrea v. Harris County Houston Ship Channel Nav. Dist.. 423 F.2d 605,610 (5th Cir. 1970), cert. denied 400 U.S. 927, 91 S.Ct. 189, 27 L.Ed. 2d 186(1970). Neither factor is present here.* We think the error instead is on the part of appellants. Through oversight or error, the lower court com-

pletely failed to consider the issue in in appellants' amendment to their complaint. It is true that Rule 15(a) F.R. Civ.P., allows an amendment once as of right "any time before a responsive pleading is served," and that the defenants' 12(b)(6) motion to dismiss is not a "responsive pleading", Rule 7(a). But it is also true that the lower court granted an extension of time for the plaintiffs to respond to the motion to dismiss, and yet the amendment to the complaint was filed well after this time. We need not reach any question of the interaction of Rule 15 with the rules governing dismissal, for we conclude that under the circumstances, the lower court was entitled to rely on its expectation

that issue had been joined on the sufficientcy of the complaint. If the lower court was of the opinion, right or wrong, that the amendment came too late, appellates still had several avenues of relief available in that forum. They could have filed a Rule 59(c) motion to alter or amend the judgment. Or they could have moved the court to reopen the judgment under Rule 60(b)(1) as a judgment entered through the mistake or inadventure of the trial court. This court has held that Rule 60(b)(1) relief is available when the mistake or inadventure is that of the trial judge. See e.g. Oliver v. Home Indemnity Co. 470 F.2d 329 (5th Cir.1972), and Meadows v. Cohen, 409 F.2d 750 (5th Cir.1969). And we have long since held that Rule 60(b)(1) re-

lief might be sought even after the entry of notice of appeal. Ferrell v. Trailmobile, Inc., 223 F.2d 697(5th Cir. 1955). The latter would have been the more appropriate course for appellants to have taken. Failing that, we direct that the lower court modify its judgment of dismissal so as to provide that the claim contained in the amended complaint be dismissed without prejudice.

Issues 6 through 10 concerning the lower court's failure to make various rulings in their favor, were neither addressed to the lower court, nor argued by appellant. We have carefully considered all issues discussed by appellants in their briefs and find no error on the part of the district court.

Judgment MODIFIED and AFFIRMED as modified.

Opinion No.2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS A. MC CRARY, et al
v.
BEN W. FORTSON, et al.

CIVIL ACTION
NO. C_78-1147A

ORDER

This is an action seeking declaratory and injunctive relief instituted by the Independent Party of Georgia (hereafter referred to as the "party"), two of the party's candidates, and a registered voter of the State of Georgia who alleges that he desires to vote for the party candidates in the upcoming general election. Named as defendants are various state officials charged with the enforcement of the Georgia election laws. The plaintiffs allege that these laws are unconstitutional

facially and as applied to the plaintiffs. Presently pending is the defendant's motion to dismiss.

The plaintiffs first contend that Ga. Code Ann. §§ 34-10029c is vague, confusing, unequal and discriminatory in that the 1977 amendment sets only a deadline for filing notices of candidacy without providing a beginning date for that purpose, "as is accorded candidates of political parties for primary nomination..." This, the plaintiffs claim, gives political party candidates more opportunity to "correct, amend or modify" the notice. Any argument that a change in the time for filing a notice of candidacy is completely frivolous, since the date for filing, the second Wednesday in June, was not changed by the 1977 amendments. Even if it had been modified

any prejudice to the plaintiffs was caused by their own neglect in failing to keep informed of changes in the election laws.[1] * Perhaps the plaintiffs mean to challenge the new date for the filing of nomination petitions, as opposed to notices of candidacy. They would still fail to make out a constitutional violation since they can hardly claim prejudice. The date was changed from the second Wednesday in June to the second Wednesday in July, thereby giving the plaintiffs an extra month in which to file their nominating petitions. See Ga. Code Ann. § 34-1002c.

Furthermore, the names of political party candidates are placed on the ballot without their having to file a notice of candidacy, Ga. Code Ann. § 34-1002e and it

does not appear that they have the advantage of more time to "correct, amend or modify" their notices than the plaintiffs. Thus, any allegations of discriminatory treatment is without merit.

Ga. Code Ann. §§ 34-1002d requires each candidate filing a notice of candidacy to submit an affidavit stating certain information. The plaintiffs charge that when Jesse Cleveland and Thomas A. McCrary attempted to file their notice of candidacy, the defendant Frances Duncan, a Georgia election official, required them to file the notice of candidacy and affidavit, on forms supplied by her, even though, they allege, "said Plaintiff presented to said Defen-

dent documents satisfying said requirements..." While this may have been inconvenient for the plaintiffs, it certainly does not amount to a denial of their Fourteenth Amendment rights, as alleged.

The next challenge is directed toward the requirement of Ga. Code Ann. §§ 34-1010b that nomination petitions contain the signatures of "not less than five per cent of the total number of electors eligible to vote in the last election for the filing of the office the candidate is seeking..." The constitutionality of this provision was upheld in Jenness v. Fortson, 403 U.S. 431 (1971), and will not be further considered. Likewise, the 180-day limitation for gathering signatures

for nominating petitions was declared valid in Ashworth v. Fortson, 424 F.Supp. 1178 (N.D, Ga. 1976).

Ga. Code Ann. § 34-1908, which makes criminal any unqualified or false signing of a nominating petition, is also attacked as being "restrictive, arbitrary and discriminatory...[in that] the principal purpose of said law is to make it practically humanly impossible for candidates of political bodies for high national and state offices to qualify their candidates." Any person signing a nomination petition need not fear being charged with a felony so long as he or she does not knowingly and willfully sign the petition without being a qualified voter, or make a false statement, or sign more than the permitted number of petitions. Such requirements seem quite necessary in order to avoid fraud which sometimes accompanies petitions with large numbers of signatures.

The plaintiffs next assert thaT Ga. Code Ann. § 34-1010g was discriminatorily applied to them when the defendant, Duncan, insisted that they file, on the second Wednesday in June, certified minutes of the state convention of the party, at which two of the plaintiffs were nominated as candidates. The gravamen of their complaint seems to be that the minutes need not be filed by a candidate until the nomination petition is submitted, on the second Wednesday in July.

The plaintiffs seem to have confused two different code sections. Under Ga. Code Ann. § 34-1010g, it is true that a "certificate sworn to by the chairman and secretary of a political body...stating that the named candidate is the nominee of that

political body by virtue of being nominated in a convention..." must be filed with the nomination petition in order for the candidate to be placed on the ballot as that political body's nominee. Otherwise, a candidate will be listed as an independent. However, here Duncan required not a sworn certificate from the party's officials, but rather a certified copy of the minutes of the party's convention. The filing of a copy of the minutes must be a part of the party's own rules; Ga. Code Ann. § 34-1012c5; otherwise, the Secretary of State will not approve its rules and regulations, which will, in turn, prevent the party from nominating its candidates by convention. Ga. Code Ann. § 34-1012a. The certified copy of the minutes must accompany the notice of candidacy,

Ga. Code Ann. § 34-1012c5, and must be filed on the second Wednesday in June. Ga. Code Ann. § 34-1002b. Hence, Duncan properly required a certified copy of the party's minutes to be filed with the notice of candidacy on June 14, 1978.

Ga. Code Ann. § 34-1012c, the plaintiffs complain, requires a "de facto political body primary machinery [which] unfairly restricts the growth of new political bodies..." That section prohibits the approval of the rules and regulations of a political body unless they provide for notice to the public of the convention, proper apportionment of convention delegates, and filing a certified copy of the convention minutes with the notice of candidacy. In other words, they serve to insure public

participation and proper representation at the convention, and protect the political body by making certain that no one files a notice of candidacy without having been properly nominated at the party's convention. Clearly, the state's interest in achieving these goals outweighs the minimum burden placed on the party in prescribing and implementing the necessary rules.

Ga. Code Ann. §§ 34-1011a sets out the criteria by which the Secretary of State shall determine the validity of a nominating petition. If it contains facially apparent material errors and defects, or material alterations made after signing without the consent of the signers, or does not contain a sufficient number of signatures the Secretary is not authorized to file the

petition. The plaintiffs characterize this section as being "vague, confusing and unconstitutional..." as well as failing to set forth criteria by which the Secretary can decide the validity of the petitions. The code section is clear in its mandate. Absent an allegation that it has been applied to the plaintiffs in some arbitrary or discriminatory manner, the attack must fail.

Ga. Code Ann. § 34-1206 details the procedure for the use of the voting machines. These are generally mechanical requirements and do not appear, by any stretch of the imagination, to be relevant to the plaintiffs here. Any contentions with respect to this section must be dismissed.

Finally, the plaintiffs allege that Duncan and Kipling L. McVay, another election official, demanded that the plaintiffs file certain campaign disclosure reports which are not required of them by law. Any allegation in this connection seems to have been rendered moot by a letter from McVay to Jesse Cleveland, dated July 25, 1978, and attached as "Exhibit A" to the defendant's motion to dismiss. The letter notifies Cleveland to disregard the warning letter mailed to him by the State Campaign and Financial Disclosure Commission, and advises him that he will not, in his present status, have to file a report unless he has engaged in certain financial activities

with respect to his campaign, or he is a candidate as defened by Ga. Code Ann. § 40-3803b. The commission is apparently under the impression that Cleveland is not, at this point, required to file a disclsure report, and there is no warning or threat of prosecution. It appears then, that there is no present controversy between Cleveland and the commission.

For the foregoing reasons, the defendants' motion to dismiss is granted.

So ordered this the 14 day of September, 1978.

Albert E. Henderson
Judge, United States District Court, for the Northern District of Georgia